

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

MAURICE WEBB,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (SAN BERNARDINO),

Respondent.

Case No. LA-CE-780-H

PERB Decision No. 1609-H

April 2, 2004

Appearance: Maurice Webb, on his own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Maurice Webb (Webb) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Trustees of the California State University (San Bernardino) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by retaliating against Webb for filing a grievance and by denying Webb a fair grievance hearing.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the warning and dismissal letters and Webb's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

¹HEERA is codified at Government Code section 3560 et seq.

ORDER

The unfair practice charge in Case No. LA-CE-780-H is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

Dismissal Letter

December 18, 2003

Maurice Webb
6601 Victoria Avenue, Apt. H-246
Highland, CA 92346

Re: Maurice Webb v. Trustees of the California State University (San Bernardino)
Unfair Practice Charge No. LA-CE-780-H
DISMISSAL LETTER

Dear Mr. Webb:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 22, 2003. Therein you allege that the Trustees of the California State University (San Bernardino) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by retaliating against you and by denying you a fair grievance pursuant to Article 10, section 10.4 of the parties' agreement.

I indicated to you in my attached letter dated December 2, 2003, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to December 12, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my December 2, 2003 letter.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

LA-CE-780-H
December 18, 2003
Page 3

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Marie A. Nakamura
Regional Attorney

Attachment

cc: Elisabeth Sheh Walter

Warning Letter

December 2, 2003

Maurice Webb
6601 Victoria Avenue, Apt. H-246
Highland, CA 92346

Re: Maurice Webb v. Trustees of the California State University (San Bernardino)
Unfair Practice Charge No. LA-CE-780-H
WARNING LETTER

Dear Mr. Webb:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 22, 2003. Therein you allege that the Trustees of the California State University (San Bernardino) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by retaliating against you and by denying you a fair grievance pursuant to Article 10, section 10.4 of the parties' agreement.

Facts

You are a Lecturer in the School of Social and Behavioral Sciences at CSU San Bernardino and are represented by the California Faculty Association. For the 2002-2003 academic year you received a 94% approval rating in the Student Evaluation of Teaching Effectiveness.

On May 30, 2002, you filed a "careful consideration" grievance alleging a violation of Article 12, section 12.7 of the Memorandum of Understanding between CFA and CSU.² A copy of the

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

²Article 12, section 12.7 provides:

Each department or equivalent unit shall maintain a list of temporary employees who have been evaluated by the department or equivalent unit. If such an employee applies for a position in that department or equivalent unit or applicant pool for that department or equivalent unit, the faculty unit employee's previous periodic evaluations and his/her application shall receive careful consideration. If a temporary employee applies for a subsequent appointment and does not receive one, his/her right to file a grievance shall be limited to allegations of a failure to give careful consideration. Such a grievance would constitute an

grievance was not provided with the charge. Article 10 contains the parties' grievance procedure and provides in part for Level I, Campus Level Review and Level II, System Level Review. Level II is an appeal of the Level I decision and is filed with the Office of the Chancellor. If the grievance is not settled at Level II, it may be appealed to arbitration. On March 12, 2003, the Office of the Chancellor denied your grievance at Level II, and on April 30, 2003, California Faculty Association Administrative Assistant for Representation Dorothy Poole sent a letter to Assistant Vice Chancellor Human Resources Sam Strafacci withdrawing the demand for arbitration of your grievance.³

On June 25, 2003, the Dean of the College of Social and Behavioral Sciences, John A. Conley, sent you a memorandum regarding "Course Enrollments in Social Science 306 for Spring 2003." The memorandum states in pertinent part:

As you know the enrollment cap for SSCI 306 courses is 26 students. Because you have had a pattern of over enrollment in SSCI 306 courses in the past, Associate Dean Jenny Zorn and I have informed you verbally on numerous occasions to closely manage drops and adds for your courses in order to keep your enrollment at the maximum of 26 students. In addition, I have sent you memoranda (9/17/2002, 1/28/2003, 4/8/2003) reminding you of this maximum. You continue to enroll students beyond that maximum in direct violation of our instructions to you. If you continue to fail to comply with directions from Associate Dean Jenny Zorn and myself regarding maximum enrollment of these courses, I will have no choice but to place a letter of reprimand in your personnel action file.

I called your office on November 19, 24 and December 1, 2003. Each time the phone rang several times and there was no answer.

Discussion

You allege that you were denied a fair grievance process because "Associate Dean Jenny Zorn failed to report the facts of my case in an accurate and timely manner." You also allege that CSU retaliated against you for filing the May 2002 grievance.

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision

allegation of a contractual violation and would not be a "Faculty Status Matter" as defined in Article 10 of this Agreement.

³ A copy of this letter was provided by Respondent.

No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

First, you allege that CSU denied you a fair grievance when "Associate Dean Jenny Zorn failed to report the facts of my case in an accurate and timely manner."⁴ It is not clear what type of

⁴ Government Code section 3571 sets forth unfair practices by an employer under HEERA and provides:

It shall be unlawful for the higher education employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
- (b) Deny to employee organizations rights guaranteed to them by this chapter.
- (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.
- (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another. However, subject to rules and regulations adopted by the board pursuant to Section 3563, an employer shall not be prohibited from permitting employees to engage in meeting and conferring or consulting during working hours without loss of pay or benefits.
- (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3590).

an unfair practice violation you allege by this statement. You do not provide an explanation in the charge as to the "who, what, when, where and how" of this allegation. If the grievance referred to in this allegation was the one filed in May 2002, then the allegation is outside the statute of limitations. This charge was filed on August 22, 2003. As such only conduct underlying the charge that occurred on or after February 21, 2003 falls within the six month statute of limitations. It is incumbent upon you, as Charging Party, to demonstrate that this allegation is timely filed and the "who, what, when, where and how" of this allegation.

Second, to demonstrate a discrimination/retaliation violation pursuant to Government Code section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

(f) Consult with any academic, professional, or staff advisory group on any matter within the scope of representation for employees who are represented by an exclusive representative, or for whom an employee organization has filed a request for recognition or certification as an exclusive representative until such time as the request is withdrawn or an election has been held in which "no representative" received a majority of the votes cast. This subdivision is not intended to diminish the prohibition of unfair practices contained in subdivision (d). For the purposes of this subdivision, the term "academic" shall not be deemed to include the academic senates.

Here, you demonstrate some but not all of the requirement of a retaliation violation. You exercised rights under EERA when you filed the grievance in May 2002 and when you appealed through the grievance procedure through March 2003, and then withdrew the grievance in April 2003. The University took adverse action against you by issuing the letter of June 25, 2003. However, you have not demonstrated sufficient nexus between the protected activity and the adverse action. While there is temporal proximity between the withdrawal of your grievance in late April 2003, and the issuance of the letter in June, you have not demonstrated any of the other indicia of nexus above. You must provide other indicia of nexus to demonstrate a retaliation violation.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before December 12, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Marie A. Nakamura
Regional Attorney

MAN